In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-372

LANCE SCHENKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that there was no evidence to support the trial court's finding that he would not benefit from sentencing under the Youth Corrections Act, and that the imposition of an adult sentence therefore deprived him of liberty without due process.

On December 4, 1972, petitioner, then nineteen years old, entered a plea of guilty in the United States District Court for the Southern District of Florida to one count of an indictment charging distribution of a controlled substance (496 tablets of lysergic acid diethylamide (LSD)), in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.[1] The remaining counts were dismissed by the government.

[1]Also indicted with petitioner were Peter Dillon and David Bowers, who entered pleas of guilty and were sentenced to probation under the Youth Corrections Act, and Elliot Lavigne, who was convicted after trial and committed to the custody of the Attorney General under that Act, 18 U.S.C. 5010(b).

After reviewing the pre-sentence investigation (Transcript of hearing on remand, 16), the trial court sentenced petitioner to a term of six months' confinement in a jail-type institution to be followed by 30 months' probation, pursuant to 18 U.S.C. 3651.

Following release from his confinement petitioner moved under Rule 35, Fed. R. Crim. P., for resentencing under the Youth Corrections Act, 18 U.S.C. 5010. The motion was denied. On appeal, the court of appeals vacated the original sentence and remanded the case to the district court for resentencing "with appropriate findings under 18 U.S.C. § 5010(d)" (Pet. App. 1-2; 486 F. 2d 319). After a hearing, the district court entered an express finding that petitioner would not benefit from sentencing under the Act and re-imposed the original sentence (Pet. 4). The court of appeals affirmed *per curiam* (Pet. App. 3).

Petitioner's contention that he is entitled to appellate review of the record to determine whether there was evidentiary support for the sentencing court's "no benefit" finding under the Youth Corrections Act is foreclosed by this Court's decision in *Dorszynski* v. *United States*, No. 73-5284, decided June 26, 1974. As the Court there held, the "no benefit" finding required by the Act before a youth offender may be given an adult sentence is not a substantive standard; the purpose of that requirement is merely "to insure that the sentencing judge exercised his discretion in choosing not to commit a youth offender to treatment under the Act." Slip op. 19.

Thus petitioner, as a youth offender, was entitled only to have the sentencing judge consider the option of treatment under the Act. The sentencing judge expressly con-

sidered that option and rejected it.[2] "Once it is made clear that the sentencing judge has considered the option of treatment under the Act and rejected it, * * * no appellate review is warranted." *Ibid.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[2]The presentencing report showed that petitioner had been distributing large quantities of LSD as well as cocaine and that he was more involved in these offenses than were his codefendants.